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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941

Nos. 1104-1105

WILLIAM MILBURN,

Petitioner,

vs.

MARTHA HEALD and ORLAND HEALD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRITS OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF

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PETITION FOR WRITS OF CERTIORARI

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William Milburn, respectfully represents to this court as follows:

This action was brought by respondents, Martha Heald and Orland Heald to recover damages for personal injuries occasioned by the alleged negligence and wilful and wanton misconduct of petitioner, William Milburn. The action was brought in the District Court of the United States for the Northern District of Illinois, the jurisdiction of which court was based upon diversity of citizenship.

The trial resulted in two separate verdicts in favor of the plaintiffs below, Martha Heald and Orland Heald, for the sums of Nine Thousand ($9,000.00) Dollars and One Thousand ($1,000.00) Dollars respectively (Tr. 361-362). Judgments were entered upon such verdicts on the 7th day of January, 1941 (Tr. 368).

On appeal to the United States Circuit Court of Appeals for the Seventh Circuit that court affirmed the judgments of the trial court, the opinion being filed (Tr. 392, 399) and the judgment of affirmants (Tr. 400) being entered on the 13th day of January, 1942.

The complaint consists of two counts. The first count (Tr. 2), omitting formal parts, charged that the defendant:

(1) Carelessly and negligently drove and operated his said automobile.

(2) Carelessly and negligently drove his said automobile at a speed greater than was reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of persons on said public highway, at the place aforesaid, contrary to and in violation of Paragraph (a), Section 49, of Article VI, of the Uniform Act Regulating Traffic on Highways, of the State of Illinois.

(3) Carelessly and negligently failed to keep a reasonably careful lookout for traffic approaching from the opposite direction, and to determine the position of his automobile on the roadway.

(4) Carelessly and negligently failed to drive his automobile on the right half of the roadway, although the roadway was of sufficient width and open to traffic proceeding in both directions; but, on the contrary, drove his automobile on the left half thereof, into the path of the automobile of the plaintiffs; contrary to the provisions of Section 54 of Article VII of the Uni-

form Act Regulating Traffic on Highways, of the State of Illinois.

(5) Carelessly and negligently drove his automobile to the left of the center of the said highway, into that part of the roadway thereof reserved for traffic moving in the opposite direction.

(6) Upon meeting the automobile of the plaintiffs, carelessly and negligently failed to pass to the right thereof, and carelessly and negligently failed to give the driver of the plaintiffs' automobile at least one-half of the main traveled portion of the roadway as nearly as possible; contrary to the provisions of Section 55, of Article VII of the Uniform Act Regulating Traffic on Highways, of the State of Illinois.

(7) Carelessly and negligently drove his automobile on said highway at a time when said vehicle, by reason of the fact that one of the wheels thereof was insecurely attached thereto, was in such unsafe condition as to endanger persons and property, contrary to the provisions of Section 102 of Article XV of the Uniform Act Regulating Traffic on Highways, of the State of Illinois, as a direct and proximate result of which the aforesaid wheel became detached from the automobile and caused said vehicle to run onto the left half of the highway and come into violent collision with the automobile of the plaintiffs.

The second count (Tr. 5) is a wilful and wanton count and charges that the same acts of negligence above set forth were done wilfully and wantonly and with a conscious indifference to surrounding circumstances and conditions.

Defendants' answer to both counts (Tr. 8, 10) denied all of these allegations of negligence and wilful and wanton misconduct.

With respect to the alleged negligence or wilful and wanton misconduct of the defendant claimed to be the proximate cause of the injuries in question the essential facts are as follows:

The collision in question occurred upon U. S. Route 330, an ordinary two-lane concrete pavement eighteen feet in width, divided by a center line, between the cities of Elburn and Geneva, in Kane County, Illinois. At the time of the collision the respondents, Martha and Orland Heald, were traveling in an easterly direction and the petitioner, William Milburn, was traveling in a westerly direction upon said highway, approaching each other. The highway was straight (Tr. 120) flanked by ordinary grass shoulders (Tr. 66) and the day July 1, 1940 was a clear, warm, dry day (Tr. 66, 121). The collision occurred about 2:15 to 2:30 in the afternoon (Tr. 62, 121, 197).

Prior to the collision William Milburn, the petitioner, had left his home in DeKalb, Illinois (Tr. 179, 181) driving a 1934 Chevrolet two-door sedan. A week or ten days earlier this car had been taken in trade by a firm in which Milburn was one of the partners (Tr. 180, 243). At that time a firm mechanic had submitted the car to a routine inspection, including tests of the brakes, nuts, lights, horn, windshield wiper and a three or four mile road test (Tr. 243). Milburn drove to Geneva, had breakfast (Tr. 181) and then drove to Downers Grove where he stopped to shop for used cars (Tr. 181). He went from Downers Grove to Hinsdale and between 10:30 and 11:00 o'clock in the morning stopped at a tavern on the way for ten or fifteen minutes and had two drinks of whiskey (Tr. 182, 196, 197). In Hinsdale he looked at used cars and then drove to LaGrange, Illinois, where he looked at used cars (Tr. 182-183).

Between 11:30 and 12 o'clock he drove to the Oldsmobile Garage in LaGrange where he asked a mechanic to investigate a creaking noise in the rear end of his car (Tr. 153, 155, 158, 183). He had demonstrated this noise to the mechanic by driving the car backward and forward across the yard (Tr. 153, 183). The mechanic located the noise in the left rear wheel, removed the hub cap and tightened the nuts on that wheel (Tr. 153, 155, 158, 183), all of which were loose about one turn of the wrench. The mechanic, by having Milburn drive backward and forward four or five times, showed that the noise was eliminated and he told Milburn that the car was O. K. (Tr. 154, 159, 194). Milburn did not detect a loose wheel at any time thereafter (Tr. 195).

Leaving this garage about noon, Milburn drove east to Harlem Avenue in the City of Chicago where he had lunch (Tr. 184). He then looked at used cars in the yard of the National Garage nearby (Tr. 184). Thereafter he drove to Snow Brothers Ford Garage in Oak Park, Illinois where he looked at used cars (Tr. 185). On his return journey he drove on Route 64 to St. Charles, Illinois and then turned south to U. S. Route 330 (Tr. 185) and was on the westward journey on U. S. Route 330 at the time the collision occurred. In the interim Milburn had traveled between sixty and one hundred miles (Tr. 197-198).

As the motor vehicles approached each other, Heald, driving plaintiffs' car, was going about forty miles per hour (Tr. 120) and Milburn between thirty-five and forty-five miles per hour (Tr. 186, 199). There were no other cars in sight (Tr. 121, 199). Heald saw the defendant's car when it was between fourteen hundred and fifteen hundred feet—more than a quarter of a mile—away (Tr. 121, 147). There was nothing out of the ordinary about Milburn's car that attracted his

attention when he first saw it at a distance coming toward him (Tr. 127, 147). He saw it from then until the time of the collision (Tr. 121) and testified that the defendant was doing a pretty good job of driving it (Tr. 147). The plaintiff, Martha Heald, testified that she saw defendant's car before the collision and noticed it only as she would notice any car approaching (Tr. 113). The defendant was traveling within his own proper traffic lane (Tr. 187, 198).

When the two cars were about seventy-five to eighty feet apart (Tr. 121, 200) the rear end of the Milburn car suddenly dropped (Tr. 186, 199) and in the same instant the car veered south of the center line toward the Heald car (Tr. 113, 121). The left sides of the two cars came together.

After the collision the left rear wheel of the defendant, Milburn's, car was missing (Tr. 18, 72, 90). The wheel was in a field on the north side of the road (Tr. 68, 72, 83-84). No damage was done to the fence nor did it bear any tire marks. The wheel itself bore no marks of damage nor did the tire, which was inflated (Tr. 73, 91, 164-165).

The wheels on the defendant, Milburn's, car were perforated by six holes arranged in a circle around the center of the wheel. From each axle drum on the car six bolts extended, arranged in a corresponding circle around the center of the axle drum. The wheel was locked to the drum by the bolts and nuts (Tr. 107). After the accident the nuts were still on the bolts on the left rear axle drum of the Milburn car (Tr. 106-107-108). Later it was shown that the holes on the left rear wheel were worn but undamaged (Tr. 108, 165) and that the nuts used to clamp this wheel to the axle drum could be passed through the holes (Tr. 108-109, 165).

There was considerable testimony with respect to the defendant, Milburn's, condition and behavior after the collision. There was evidence that Milburn was suffering from pain and shock but was not drunk. W. A. Keefer expressed the opinion that Milburn was not drunk but that he appeared to be dazed and in pain (Tr. 173, 175). C. A. Sorenson, a motorist who happened upon the scene, testified to the same effect (Tr. 163-164). The defendant, William Milburn, testified that he remembers nothing from the time the rear end of his car dropped just before the collision until he got into the Smith car after the collision and that he was not drunk when the collision occurred (Tr. 186, 188, 199, 203). Two witnesses who had seen Milburn earlier in the day testified that he was not drunk at the time they saw him.

On the other hand, there was testimony that after the accident Milburn was drunk, that he admitted he was drunk, that he refused to tell his name and talked incoherently and that he smelled of liquor.

Testimony was also admitted, over the objection of defendant, that James Smith, a constable who arrived on the scene, arrested Milburn and took him to the county jail at Geneva (Tr. 20-21, 64, 67, 71, 173-174). The court also admitted, over objection, the details of the arrest and incarceration of Milburn and the action taken by the officials in connection with his prosecution and the subsequent discontinuance thereof.

It is the contention of your petitioner that the evidence of the arrest of the defendant after the accident, his incarceration in jail and all of the circumstances incident to his arrest and the proceedings in connection with his prosecution on the charge of driving while intoxicated, was inadmissible under the Illinois law. That the issue whether or not the defendant was under the

influence of intoxicating liquor at the time the collision occurred was one of the issues for the jury in this case to decide. That the evidence relative to the arrest, incarceration and prosecution improperly advised the jury of the action of law enforcement officials, precluding the possibility of an open mind on the question of intoxication. That since such evidence was inadmissible under the Illinois law its admission by the trial court and the decision of the Circuit Court of Appeals holding it to be admissible is in conflict with the local applicable decisions and should be reversed.

It is also the contention of your petitioner that the respondents' closing argument to the jury which made a blanket charge of dishonesty, perjury and untruth against the entire defense and everyone connected with it was not only without foundation in the record but was, in language, so violent and vituperative as to be highly prejudicial to the defendant and to preclude the possibility of a fair trial; that the failure of the trial court to sustain objections thereto inadvertently lent the prestige of the trial court to the charge and the failure of the United States Circuit Court of Appeals to reverse the case on that ground was such a departure from the accepted and usual course of judicial procedure as to call for an exercise of the power of supervision of this court.

Only one cause was started in the District Court of the United States but that court entered separate judgments for different amounts in favor of the plaintiffs. Both of the judgments have been affirmed by the United States Circuit Court of Appeals for the Seventh Circuit, and that Court has stayed its mandate, pursuant to rule pending this application for writs of certiorari. Your petitioner presents herewith as a part of this petition and attached thereto a brief, showing more fully the issues involved.

WHEREFORE, your petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that this honorable court issue writs of certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this court a full and complete transcript of the record herein to the end that said judgments in favor of respondents Martha Heald and Orland Heald and against your petitioner may be reviewed and determined by this court as provided by law and that said judgments and each of them may be reversed and that your petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just and your petitioner will ever pray.

Respectfully submitted,

BARNABAS F. SEARS,
Attorney for Petitioner.